

Internal Revenue Service
memorandum

CC:TL-N-5812-89

Br4:CRGilbert

date: MAY 05 1989

to: District Counsel, Kansas City CC:KC

from: Assistant Chief Counsel CC:TL
(Tax Litigation)

subject: Tax Court [REDACTED]

This replies to your April 10, 1989 request for tax litigation advice. We understand the above-styled case was recently settled based on the informal advice we gave your attorney Dennis Onnen on March 1, 1989. Formal tax litigation advice is now being requested because subsequent to our informal advice, you became aware of an apparent contradiction between our informal advice and reported Tax Court cases.

ISSUE

Whether the Tax Court may determine an overpayment where the taxpayer fails to file a return, the notice of deficiency is mailed more than two years but less than three years after the due date of the return, and the parties agree that the taxpayer's withholding tax exceeds his tax liability for the year at issue.

FACTS

The petitioner failed to file his [REDACTED] income tax return. A notice of deficiency for the year was mailed on [REDACTED]. The taxpayer had \$[REDACTED] withheld from his [REDACTED] wages, and it was determined that his proper tax liability for the year was \$[REDACTED].

DISCUSSION

We have reviewed the case cited in your request for advice and we agree that the cases support the position that where no return has been filed, the two year rule under I.R.C. § 6511(a) applies in determining whether the Tax Court may find an overpayment in light of the limitation under I.R.C. § 6512(b)(3)(B).

In addition to the cases you cite, White v. Commissioner, 72 T.C. 1127 (1979), is also on point. The petitioner was a tax protestor seeking to recover her 1972 estimated tax payments. She and her husband had filed a Form 1040 for that year, but the

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court held that the form was insufficiently completed and did not serve as a return. The estimated tax was deemed paid on April 15, 1973, pursuant to I.R.C. § 6513(b)(2). The notice of deficiency was mailed on August 14, 1975, and she filed a claim for refund on September 17, 1975. Citing Hoskins v. Commissioner, 62 T.C. 635, 639-644 (1974), the court stated that since the period to file a timely claim for refund under I.R.C. § 6511 had expired on April 15, 1975 (two years after payment), the petitioner could not have filed a timely claim for refund upon the mailing of the deficiency notice on August 14, 1975, and I.R.C. § 6512(b)(2)(B) (the relevant section at that time) mandated that no credit or refund be allowed. The court has since reached the same result under similar facts in Lynn v. Commissioner, T.C. Memo. 1988-401, and Crady v. Commissioner, T.C. Memo. 1987-274.

The Treasury Regulations support the court's opinion. Where no claim for refund has been filed prior to the mailing of a deficiency notice, Treas. Reg. § 301.6512-1(b)(2) provides that no refund shall be allowed or made of any portion of the tax unless the Tax Court determines the portion was paid within the period which would be applicable under I.R.C. § 6511(b)(2), (c), (d), or (g). As to determining the proper period, the regulation refers to Treas. Reg. § 301.6511(b)(1) which at subsection (b)(ii) states that if no return is filed, but a claim is filed, the amount of the refund shall not exceed the portion of the tax paid within the two years immediately preceding the filing of the claim. Only if a return is filed within three years prior to the filing of a claim, will a three year period apply. Treas. Reg. § 301.6511(b)(1)(b)(i).

Rev. Rul. 76-511, 1976-2 C.B. 428, does provide that even where a late filed original return claims an overpayment, the three period is satisfied. A return itself is considered a claim for refund under Treas. Reg. § 301.6402-3. The revenue ruling thus poses a litigating hazard since it supports the position that the three year period may apply under the fact pattern here. To our knowledge, the Tax Court has not ruled on this particular argument; however, White demonstrates that the court will not apply the three year period in the event an original return is filed after the mailing of a deficiency notice even though the three year period would otherwise apply to a refund claimed on a late filed original return.

.CONCLUSION

In light of the Service's litigating success in the Tax Court, we believe the Service's position should be that the two year period applies where no return has been filed prior to the mailing of a deficiency notice.

If you have any questions or need further information, please contact Craig R. Gilbert at FTS 566-3305.

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By: 

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